

ORIGINAL

FEDERAL MARITIME COMMISSION

TRANSWORLD SHIPPING (USA), INC. v.
FMI FORWARDING (SAN FRANCISCO),
INC. A/K/A/ INTER-MARITIME
FORWARDING (SAN FRANCISCO) Co.,
INC. AND UNION-TRANSPORT
CORPORATION

Docket No. 01-02

Served: October 24, 2002

Order adopting Award on Fees in part and awarding additional attorney's fees

BY THE COMMISSION: Steven R. BLUST, *Chairman*; Joseph E. BRENNAN, Harold J. CREEL, Jr., and Delmond J.H. WON, *Commissioners*.

ORDER

I. **PROCEEDING**

This proceeding was initiated by a complaint filed by Transworld Shipping (USA), Inc. ("Transworld") against Respondents, FMI Forwarding (San Francisco), Inc. ("FMI") and Union-Transport Corporation ("Union-Transport"). In its complaint, Transworld alleged that Respondents engaged in unfair

and deceptive practices, in violation of sections 10(a)(1)¹ and 10(d)(1)² of the Shipping Act of 1984 (“Shipping Act”), 46 U.S.C. app. §§ 1709(a)(1) and (d)(1). Transworld further alleged that Respondents violated certain other Commission regulations requiring disclosure of the locations of branch offices and of changes in their corporate structures and relationships. 46 C.F.R. § 515.18.

On April 2, 2001, Administrative Law Judge Paul B. Lang (“ALJ”) approved a joint stipulation between Transworld and FMI, in which FMI agreed that it would not contest Transworld’s allegations and that it would no longer participate in this proceeding. On June 11, 2001, the ALJ approved a confidential stipulation settlement between Transworld and Union-Transport, dismissing the complaint against Union-Transport with prejudice. Following the joint stipulation and settlement agreement, Transworld filed a motion for summary judgment against FMI. The ALJ found that FMI violated the Shipping Act, but awarded only partial reparations to Transworld. Counsel for Transworld also sought attorney’s fees, which the ALJ granted in part and denied in part. Transworld filed exceptions to that decision with the Commission.

‘Section 10(a)(1) provides that: No person may -

(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.

²Section 10(d)(1) provides that: No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

II. BACKGROUND

A. Initial Decision

On August 3, 2001, the ALJ issued an Initial Decision (“I.D.”) ruling on the motion for summary judgment. In his ruling, the ALJ found that FMI, in failing to answer the complaint, admitted to committing all of the allegations contained in the pleading. The ALJ found that FMI violated Commission regulations by failing to advise the Commission of its change of name and by billing its shipper customers on forms that were not issued under the name in which its license was issued and on which its license number was not permanently imprinted. 46 C.F.R. §§ 515.18(a)(5) and 515.31 (a) and (b). The ALJ further found that FMI’s attempt to obtain ocean transportation without *any* payment constituted a violation of sections 10(a)(1) and 10(d)(1) of the Shipping Act. I.D. at 9.

With respect to Transworld’s claim for reparations, the ALJ stated that in order to recover reparations, Transworld must show that Respondent violated the Shipping Act and that a monetary loss was proximately caused by the violation. The ALJ found that Transworld failed to support its assertion that it suffered monetary losses caused by FMI’s failure to correctly identify its business organization or by its improper billing practices and, therefore, was not entitled to recover reparations for these violations. However, the ALJ did order that Transworld recover reparations for those monies that FMI collected from shippers and failed to pay over to Transworld. Consequently, the ALJ ordered that FMI pay Transworld reparations in the amount of \$10,272.76, plus interest. The ALJ further noted that counsel for Transworld may be awarded attorney’s fees upon the filing of a fees’ petition within 30 days of a final reparations award,

pursuant to Rule 254 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.254.

B. Petition and Award of Fees

On August 23, 2001, counsel for Transworld, ("counsel") filed a petition for attorney's fees ("Fee Petition") in the amount of \$38,818. In his Fee Petition, counsel asserted, *inter alia*, that because of FMI's conduct and FMI's surety's refusal to address the undisputed claim, Transworld was obligated to file and prosecute this case before the Commission. Fee Petition at 4. Counsel opined that "the costs associated with prosecution of these Shipping Act violations would protect the surety from having to honor its obligations under the involved bond." *Id.* Counsel further argued that the "nature and complexity" of the proceeding required a "significant expenditure of time," including but not limited to, the investigation, preparation of the complaint, defense of a motion to dismiss, and the preparation of a motion for summary judgment. *Id.* Accompanying the Fee Petition was a time record, reflecting the date, amount of time spent, and a description of the duties performed, which totaled 149.3 hours. Counsel also attached an affidavit from an experienced attorney familiar with the Shipping Act, attesting to the reasonableness of counsel's invoicing, itemization of hours, and hourly rate (\$260 per hour).

Upon reviewing counsel's petition, the ALJ issued an Award of Attorney's Fees on September 20, 2001. The ALJ noted that an award of attorney's fees should be based upon not only the work performed in developing successful legal theories, but also on work that is closely related to successful theories and shares common facts. Award on Fees at 6 (citing Henslev v. Eckerhart, 461 U.S. 424,434 (1983)). The ALJ stated that counsel performed an extensive investigation into the alleged transfer of

assets between affiliated corporations and the failure to operate under the proper business name. The ALJ further stated that counsel's investigation bore virtually no relation to the claim arising out of FMI's failure to pay over money that had actually been collected from shippers. Id.

The ALJ contended that counsel's argument with respect to encouraging counsel to assist in the recovery of small claims was also implausible. The ALJ noted that counsel could have advised Transworld to obtain proof of payment by the shippers before undergoing an extensive investigation into FMI's possible corporate malfeasance. The ALJ stated that this would have eliminated counsel's need for seeking attorney's fees in an amount that significantly exceeded Transworld's recovery and the amount of damages originally sought.

In reviewing the time record submitted with the Fee Petition, the ALJ concluded that the proposed hourly rate of \$260 per hour was fair and reasonable. The ALJ also determined that a portion of the time not devoted exclusively to the claim against FMI could have contributed to the successful result. As a result, the ALJ determined that 35.3 hours in addition to the 6.65 hours that were devoted solely to the claim against FMI should be included to calculate the fee award. Therefore, the ALJ awarded counsel fees in the amount of \$10,907. The ALJ further noted that the fee award exceeded the amount of Transworld's reparations, exclusive of interest, and was slightly less than fifty percent of the monetary claim alleged in the complaint.

C. Exceptions to the Award of Attorney's Fees

On October 12, 2001, counsel filed Exceptions to the Award of Attorney's Fees ("Exceptions"). Counsel's Exceptions may be divided into four arguments. He contends that: (1) the

ALJ erred in attempting to split Count I of the Complaint, thus denying time spent establishing FMI's business practices and violations; (2) the ALJ erred in denying time spent to investigate FMI's employees, officers and owners; (3) the ALJ erred in applying the lodestar³ methodology of establishing reasonable fees; and (4) the ALJ failed to provide a detailed explanation to support his elimination of documented legal time. Exceptions at 7-8. Counsel requests that the Commission award \$27,872, which reflects 107.2 hours spent on Count I, in addition to time spent preparing the fee petition.

This proceeding is now before us on Exceptions. For the reasons set forth below, we affirm the ALJ's award of \$10,907, which reflects an award based upon 41.95 hours multiplied by an hourly rate of \$260. Moreover, we are awarding an additional \$1,560, reflecting six hours spent on the research and preparation of the Fee Petition.

III. DISCUSSION

The Commission's regulations set forth the standard by which attorney's fees may be awarded to a complainant. 46 C.F.R. § 502.254 That section provides, in relevant part, that: "[t]he Commission shall, upon petition, award the complainant reasonable attorney's fees directly related to obtaining a reparations award in any complaint proceeding under section 11 of the Shipping Act of 1984." In his I.D., the ALJ determined that "the occurrence of statutory violations by the respondent as well as the causation of the alleged damages must be shown by a preponderance of the evidence" for an award of reparations to

³The "lodestar" is the number of hours reasonably expended multiplied by a reasonable hourly rate. Copeland v. Marshall, 641 F.2d 880,891 (D.C. Cir. 1980).

issue. I.D. at 9 (citing Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., 26 S.R.R. 788, 798 (I.D.) administratively final, December 31, 1992). The ALJ found that Transworld failed to establish the necessary chain of causation between the statutory violations by FMI and Transworld's entitlement to reparations, and accordingly did not award reparations based on this theory. Id. at 10.

The ALJ further noted that counsel is only entitled to those fees "directly related" to obtaining reparations under section 11. Award on Fees at 5. Consequently, the ALJ found that counsel was only entitled to recover attorney's fees resulting from a showing that Respondent wrongfully retaining freight payments that should have been given to Transworld. In his Exceptions, counsel argues that the ALJ erred when denying legal time spent establishing FMI's business practices and regulations violations. Counsel contends that the ALJ only acknowledged the § 10(a)(1) violations, thus "splitting the claim," and disallowing time spent investigating "Respondent's employees, officers and owners' operation of Respondent and an affiliated company." Exceptions at 16-18.

The ALJ's decision on this aspect of the attorney's fees' petition is correct. The Commission's regulations as well as the Shipping Act provide for an award of reasonable attorney's fees only when the attorney's work is directly related to obtaining a reparations award. The ALJ determined that Transworld had not demonstrated that it suffered harm based upon Transworld's reliance on FMI's misrepresentations, and, therefore, it was not entitled to an award of reparations based upon this theory. Although counsel argues that the extensive investigation it undertook with respect to FMI's employees, officers, and operations was essential to its case, the investigation was not related to the actual injury Transworld suffered due to FMI's

failure to pay over freight charges collected from various shippers.

When awarding attorney's fees, the ALJ noted that awards should be based not only upon work performed in developing successful theories, but also upon work relating to theories that, although unsuccessful, are closely related to the successful theory and share a common core of facts. See Hensley, 461 U.S. at 434. The ALJ correctly determined that reparations should not have been awarded based upon counsel's assertion that Transworld suffered an actual loss based upon FMI's failure to disclose the true nature of its business organization or by its improper billing practices. See I.D. at 10. As a result, counsel is not entitled to recover attorney's fees for time spent researching and investigating such matters.

Counsel further argues that the ALJ erred when failing to award fees based upon the time spent preparing his Fee Petition. We agree with counsel on this point. As a general rule, time expended on a fee petition is compensable in the fee award itself. 10 James Wm. Moore et al., *Moore's Federal Practice* § 54.190 (Matthew Bender 3d ed. 1997). This time, which is spent establishing entitlement to, and the amount of, court awarded attorney's fees, is often referred to as "fees on fees." Id. While the Commission's rules are silent with respect to awarding "fees on fees," the Commission has awarded "fees on fees" when awarding attorney's fees. See Tampa Bay Int'l Terminals, Inc. v. Coler Ocean Independent Lines Co., 28 S.R.R. 1390, 1392 (2000). Therefore, we will award counsel attorney's fees that includes time spent preparing the Fee Petition.

The Commission's rules allow for an award of fees when directly related to obtaining a reparations award under section 11(g) of the Shipping Act. 46 C.F.R. § 502.254. In this instance, counsel asserts that a total of six hours was spent researching fee

awards, reviewing FMC decisions for current market rate findings, reviewing time records, redacting redundant time, and drafting the Fee Petition. See Exhibit B of Fee Petition. This time was directly related to the award of reparations under section 11 of the Shipping Act. Accordingly, the ALJ erred when failing to award fees based upon the time spent preparing the Fee Petition.

Finally, counsel contends that the ALJ did not provide the required explanation when eliminating documented legal time. Fee Petition at 27. Counsel asserts that the ALJ has excluded some legal time because “he attempted to split both the facts and the involved claim rather than make proper ‘reductions’ of time.” Id. This argument is likewise flawed. In Hensley v. Eckerhart, the Supreme Court held that if a plaintiff has only achieved partial success, the total hours expended times a reasonable hourly rate may be an excessive amount. See Hensley, 461 U.S. at 436. The Court found that the “most critical factor is the degree of success obtained.” Id. The Court further found that a petitioner seeking attorney’s fees should exercise “billing judgment,” excluding any time that may be excessive, redundant, or otherwise unnecessary. Id.

In the instant case, the ALJ followed the precedent established by Hensley. The ALJ ruled that Transworld was not entitled to the total amount of reparations it sought; rather, it was entitled to reparations equal to the amount of freight payments unlawfully retained by Respondent. Therefore, it was reasonable that attorney’s fees would be awarded based upon the work performed that was directly related to the actual injury Transworld suffered. Accordingly, the ALJ did not err when reducing the amount of hours for which counsel could recover attorney’s fees. Furthermore, the ALJ clearly and concisely explained his rationale for the reduction in hours. The reduction was not based upon “splitting” the claim; instead, it was based upon a fee award for

reparations awarded as a result of actual injury.

CONCLUSION


Based on the foregoing, the Award on Fees is affirmed to the extent discussed above and counsel for Transworld will recover fees in the amount of \$12,467. This amount includes an additional \$1,560 for the time spent preparing the Fee Petition.

THEREFORE, IT IS ORDERED, That Transworld's Exceptions are granted in part and denied in part;

IT IS FURTHER ORDERED, That counsel for Transworld is awarded attorney's fees of \$12,467; and

FINALLY, IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.


Bryant L. VanBrakle
Secretary